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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ALBERT SANCHEZ, Defendant and Appellant.	H029254 (Santa Clara County Super. Ct. No. EE504255)
In re ALBERT SANCHEZ, on Habeas Corpus.	H030654

Defendant Albert Sanchez was found guilty at a jury trial of resisting and battering a police officer without causing injury and possession of controlled substances and was sentenced to three years, eight months in state prison. He was also ordered to pay fines, restitution, and attorney fees. On appeal, he challenges the trial court's exclusion of testimony that he claims "bore directly on the credibility" of the victim-officer. He also asserts trial counsel was ineffective and the court erred in imposing the aggravated term in violation of *Blakely v. Washington* (2004) 542 U.S. 296, and ordering him to pay attorney fees. In a petition for a writ of habeas corpus which we have ordered considered with this appeal, defendant asserts his trial counsel was ineffective for opening the door to the prosecutor's exploitation of petitioner's prior incarceration.

FACTS

On April 11, 2005, defendant received permission from Frank de Santiago, the owner and boss at West Coast Auto Body, to borrow one of the loaner vehicles owned by the shop to go to lunch. There was only one set of keys where de Santiago told him to look. They were for a red Toyota Tercel, so defendant took it. Defendant knew nothing about the car, did not inspect the license plates or registration sticker before he drove the car out of the shop, and did not know whether there were registration or insurance papers in the vehicle. It turned out the registration had expired, the front and back plates did not match, and the registration sticker on the car belonged to a Chrysler Le Baron also owned by the shop. A mechanic, who had been working on the Tercel to get it registered, had informed de Santiago about three weeks earlier that in order to test drive the Tercel, he had put the registration sticker from the Le Baron on it. However, de Santiago had already reported the Le Baron sticker stolen to the police. After hearing from the employee, de Santiago did not have the sticker removed or warn defendant. He was with a customer and he told defendant to just take a car. De Santiago testified that defendant had been on the job for about a week and a half doing "prep work . . . to prepare vehicles for painting." His work was good--"he seemed to know what he was doing."

At 1:45 p.m., Sunnyvale Public Safety Officers James Boone and Bradley Militano were on patrol when Boone saw a car with a registration tag which appeared to be "glued or looked askew" on the license plate. A Department of Motor Vehicles (DMV) check showed that the car's registration had expired. At an intersection near a Taco Bell, Boone turned on the emergency lights. Defendant, already turning into the Taco Bell parking lot, noticed a police car behind him and realized the officers were pulling him over. He parked in a stall next to an island filled with ivy and a tree. The officers pulled in behind the Tercel so defendant could not back out. At that point, defendant was detained and not free to leave.

Boone approached the driver's side and Militano approached the passenger side of the Tercel and Boone noticed that defendant appeared to be nervous and was sweating. At trial defendant denied that he was sweaty or nervous because he had a valid driver's license and was not on probation or parole at the time. Boone testified he requested and defendant produced his driver's license which Boone checked. DMV records showed it was valid. Boone stated he could not recall asking defendant for the registration, but would have noted in his report if it had been asked for and not produced. Defendant testified that Boone asked for his driver's license, registration, and insurance, all of which defendant provided.

Defendant testified that Boone did not tell him why he was being stopped. Defendant had never encountered either of the officers before, but he had been hassled by other officers in the past. Boone testified that defendant almost immediately started to inquire why the police were hassling him. Boone responded that he believed the car's registration was expired. Defendant answered that the car belonged to his boss.

Defendant testified that Boone said he would just run defendant's name, and defendant told him to go ahead. Defendant "heard the APB come back, and it mentioned that I was gang affiliated. [¶] . . . [¶] . . . [I]t came back something like, okay, Mr. Sanchez had tattoos on the wrist having some kind of 14 [XIV, a gang tattoo]" and "a Wegel [*sic*, should be huelga] bird, [a] strike bird." The strike bird is a symbol of the farm workers' movement started by Caesar Chavez. The officers asked to see defendant's hands and wrists. Defendant stated he was wearing a sleeveless shirt and black jeans and his hands and wrists were readily visible. According to defendant, Boone started asking him "where is that tattoo at now? I mean, where did you move it to?" Defendant explained that he had had the tattoo removed by having it covered over because of his work. He stated that he was "nongang affiliated." Defendant explained at trial that "having a number or anything" would conflict with business because he had to

deal with customers and if his rivals came to work at the same place or came as customers, "[i]t would affect my boss's business or any business."

Boone accused defendant of being a "do, which is basically a drop-out," and asked defendant in front of Militano if he was a "do." Defendant "told him it was none of his business. And basically everything still started escalating, everybody got agitated."

The officers asked if there was anything in the car that they should know about and "I let them know that . . . the initial stop was still basically because of a Vehicle Code [violation]. And I kept on telling them, you're harassing me now, and I don't think . . . I know I ain't supposed to be harassed if I get stopped on an initial stop, especially if I ain't on probation and parole." Defendant believed "they were trying to get me on a gang enhancement or something because of my tattoos. When the APB came back and said I had a 14 and they found out it was no longer there, they totally just went out of it and tried to find some kind of way to get me, you know, on gang enhancement or something. Because . . . [it] carries five to ten years." Nevertheless, defendant gave them permission to search his person and the car. In response to that, defendant stated Boone said he was getting very hostile, and grabbed defendant's left hand and put it in a rear wrist twist lock. Militano did the same on the other side.

Boone testified that he did not recall receiving information from the dispatcher about a "XIV" tattoo or asking defendant about one, and Militano also did not recall any questioning about a tattoo. Boone testified that he told defendant the reason for the stop was a false tag and that he asked defendant to step out of the car to see it for himself. Defendant became more agitated and asked why the officers were hassling him. Boone stated defendant said that it was his boss's vehicle and that he knew nothing about the tags. The dispatch tape played for the jury showed that the dispatcher advised the officers that the suspect "should have a tattoo of XIV on his right wrist." The dispatch tape also advised that defendant was a "narco reg," that is, a person required to register as a drug offender.

Defendant remained nervous and angry. He put his hands in the front pockets of his black, baggy pants, and although Boone ordered him to take his hands out of his pockets, defendant complied, but soon put his hands back. Militano stated defendant complained about having been stopped and hassled previously. Defendant admitted that he "could have" "st[u]ck [his] hands in [his] pockets" more than once and that the officers told him not to do that because they were concerned for their safety.

The officers grabbed defendant's arms to search him out of fear for their safety because he might have a weapon. They also asked defendant if there was anything illegal in the vehicle. Defendant said he did not know and complained about being hassled because that was not the reason for the stop. The officers testified that just before they got hold of defendant's arms, he threw some papers on the ground. Militano testified that defendant did so when Boone said he was going to pat search defendant, before the officers had control of his hands. Boone did not know if anyone retrieved the papers and did not mention them in the initial police report or in the preliminary hearing, but came to believe dropping the papers was meant as some kind of diversion. An officer who arrived later said that he did not see any papers around either vehicle and none were pointed out to him. No papers were picked up from the ground and placed into evidence. Defendant denied dropping any papers.

The officers put defendant's arms in a rear wrist twist lock; defendant said he was not going to fight with them, and Boone told Militano he could release defendant's left arm. As Boone held defendant's intertwined fingers behind his back in an "interlock" hold and began to reach toward defendant's pockets to conduct the search, defendant broke free of Boone's grip and began to run through the parking lot. Boone and Militano chased him. The officers testified that after defendant ran for 15 or 20 feet, he entered some ivy on the eastern side of the Taco Bell, where he appeared to trip and run into a tree with the left portion of his body. After defendant hit the tree, Boone tackled him and both landed in the ivy with defendant facing down.

According to Boone, while they were wrestling, defendant said, "I'm not going back to prison." At trial defendant denied making the statement or ever being in prison, and also denied that "I'm not going back to prison" meant that he did not want to go back to jail. Defendant testified he had been to jail "[q]uite a bit," and that he knew the difference between prison and jail. He also said that he knew a little bit about the criminal justice system and was asserting his rights as not being a probationer or a parolee when he asked the officers why they were harassing him.

The officers testified that during the struggle to get away, Boone was able to get control of defendant's left hand but Militano could not get control of the right arm, which was tucked under defendant's body.

Defendant denied struggling or running. He testified that after he asked the officers why they were harassing him, Boone pulled out handcuffs, said that he was detaining defendant pending further investigation, and put the handcuffs on behind his back. Defendant said that whether accidentally or on purpose, Boone pushed him five to six feet and his shoulder collided with a tree. His knees hit the ivy on the levee or island, and due to the handcuffs he had to push off the tree to pick himself up, sustaining injuries to the inside of his left arm, shoulder, wrist, and ear. As defendant got back on his feet, Boone rushed toward him and hit him, causing him to fall down on his stomach and face with his hands cuffed behind him. Defendant testified that if he was not handcuffed as the officers testified, he would have put out his hands to prevent himself from bodily running into the tree.

All parties agreed that the officers called for backup. The officers said they repeatedly told defendant to quit resisting and to bring out his hand; Militano, who was next to defendant, struck him with fists, and when that was ineffective, with an "asp," that is, "a cylindrical metal baton that is carried in a sheath[] on our duty belts. It's an expandable device and it's designed as an impact weapon." It is about seven inches long, carried in a tube, and when shaken, it expands to 23 or 24 inches. Militano did not hit

defendant on the head or upper part of his torso, because "[t]hat would be a deadly force situation." Militano characterized the level of force used on defendant as "[a]ppropriate" but "[n]ot deadly." It was effective in subduing defendant "[e]ventually."

Nevertheless, Militano testified, defendant kicked him in the torso, arms, and calf. Boone, involved in his own struggle with defendant, did not see defendant strike or kick Militano. Throughout the struggle, Boone and Militano both yelled at defendant to quit resisting and show them his hands. Boone stated that when defendant did not desist, Militano started hitting him with his fists and then with the asp. After Militano struck defendant a few times with the asp, defendant brought his right arm out from under his body and Boone handcuffed him. It took three to four minutes to subdue defendant. Defendant's right hand had nothing in it.

Defendant testified that while he was on the ground, Boone put his foot on defendant's back, and Militano began pounding him with the baton and his fists while defendant yelled that he was not resisting. Defendant stated the blows caused additional injuries. Defendant had no explanation for why the officers struck him, except he believed they were trying to get him on the gang enhancement.

Just when defendant was subdued, Scene Investigator David Chong and others arrived. Defendant was handcuffed and lying on the ground. The officers picked defendant up and he hopped back to the patrol car. Militano testified that he searched defendant who had no contraband or weapons on his person. Chong testified he searched defendant and found a red rag and three gas lighters which could be used to heat glass smoking pipes to ingest amphetamines, but he did not discover any pipes. Militano testified Chong did not search defendant. According to defendant, Boone did a pat search but found nothing and Chong did not search him.

Boone testified that he searched the vehicle, and noticed that the license plate on the front did not match the one on the rear. The rear license plate was registered to a

1983 Subaru, whose owner Boone could not locate. Defendant testified he knew nothing about the front license plate or the registration tag on the back.

Boone and Chong searched the ivy. Boone located a white crystalline substance in a plastic baggie where the ivy was compressed from the struggle, and where, according to Boone, defendant's right hand had been tucked under him. Boone said he directed Chong to pick up the baggie. Chong testified that Boone had found the baggie and picked it up before Chong saw its position in the ivy or had a chance to photograph it, contrary to standard procedure. Militano testified that Boone found the baggie and directed Chong to collect it. Chong testified he processed the baggie for fingerprints but found none. He stated he was not surprised by the lack of prints as it is very rare to successfully pull prints from that type of surface. The powder weighed 6.5 grams, enough for 65 doses, and testing performed by Chong confirmed that it was presumptively methamphetamine or amphetamine. Later, a criminalist determined that the substance was methamphetamine.

Defendant testified that after Militano talked to the other officers, he advised defendant that he was being arrested for false tags, resisting arrest, and possession of a controlled substance. Defendant stated that was the first he knew of the possession charge and nobody showed him a bindle. Defendant stated he had no drugs in his possession; he knew nothing about the drugs found in the bushes; he asked why he was being charged with possession when they had found nothing during the pat search.

Boone could not recall whether he advised defendant at the scene that drugs had been found, but he believed Militano might have done so. Militano testified that he could not recall if he had advised defendant that drugs were collected in evidence and he had not heard anyone advise defendant of that, and he did not know if defendant had seen the recovery of the baggie. During booking defendant told him, "you can't pin the drugs on me."

Defendant had blood on his left ear; abrasions to his left shoulder, hand, right ankle and knee; and bruising on his lower back, but he declined medical attention. Boone testified defendant did not strike him and he was not injured. Militano stated he sustained pain and scratches for which no treatment was required. He cleaned the scratches with hydrogen peroxide.

Defendant was convicted of resisting an officer (Pen. Code, § 69, a felony, count 1), possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a), a felony, count 2), and battery upon an officer without causing injury (Pen. Code, § 243, subd. (b), a misdemeanor, lesser included offense to count 4). He was found not guilty of displaying false registration (Veh. Code, § 4462.5, count 3) and battery on an officer causing injury (Pen. Code, § 243, subd. (c), original offense, count 4). Defendant was sentenced to prison as stated *ante*. This appeal ensued.

ISSUES ON APPEAL

Defendant contends (1) it was error for the trial court to exclude testimony from Vincent Sayles, a witness disclosed to the defense after a discovery motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 and Evidence Code section 1043 et seq.[1] Sayles had filed a complaint against Militano, which defendant insists bore directly on the credibility of Militano. (2) This court should examine the material disclosed to the trial court pursuant to the *Pitchess* motion to determine if any additional records should have been produced. (3) Defense counsel's failure to redact the reference to "narco reg" from the dispatch tape coupled with her failure to object to testimony of an officer and to closing argument by the district attorney that "narco reg" made it more likely that defendant was guilty of the possession count constituted ineffective assistance of counsel. (4) The trial court erroneously imposed $1,500 in attorney fees on defendant despite his presumptive inability to pay pursuant to section 987.8, subdivision (g)(2). And (5) the

[1] Further statutory references are to the Evidence Code unless otherwise stated.

imposition of the aggravated term for possession of a controlled substance violated *Blakely* and defendant's rights under the Sixth and Fourteenth Amendments.

PITCHESS EVIDENCE

Defendant does not claim that the trial court failed to conduct a bona fide *Pitchess* motion. His complaint is based on the exclusion in this case of Sayles's testimony that Militano lied at the hearing held on a citation Militano issued to Sayles charging that his dog was riding untethered in the back of a pickup truck. At a section 402 hearing out of the presence of the jury, Sayles testified that Militano had pulled him over in 2001, gave him no reason for the detention initially, took and did not return his driver's license, and then issued the citation. Sayles testified the dog was riding on a wooden tool box covered with carpet in the back of the truck. She was secured by a harness that wrapped around her chest and neck and was attached to both sides of the tool box. The dog had ridden like that for years, and Sayles had never received a citation. Sayles claimed Militano lied because Militano wrote "untethered" on the citation but testified that the dog was tied with a 12-foot rope.

Sayles felt he did not give a full and complete statement at the hearing on the citation about everything that happened with Militano because he was emotionally upset and frustrated at the hearing. He was found guilty. Thereafter, Sayles complained to the Sunnyvale Department of Public Safety about Militano. It held an investigation and "let him off," although Sayles did recover the cost of a new driver's license. Sayles did not appeal the trial court's finding because he moved out of the area and he felt it was "too much for [him] to deal with under the circumstances [he] was living with" to "prove that the judge made a mistake." Sayles did not know the exact code number for the violation.

The trial court excluded Sayles's evidence impeaching Militano's credibility under section 352 because it "presents a collateral issue of very little relevance. The undue consumption of time involved in relitigating a citation where the complainant doesn't even know . . . the exact nature of the complaint that was issued or the citation that was

issued by the . . . officer, which was resolved against him on two occasions factually, should be excluded because it involves undue consumption of time, has very little relevance to the issues before the court."

Trial courts have the discretion under section 352 to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Such an exercise of discretion shall not be disturbed on appeal absent a showing that such discretion was exercised in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) " 'The latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad. The statute empowers courts to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.' " (*People v. Ayala* (2000) 23 Cal.4th 225, 301.)

The trial court partially based its exclusion of Sayles's testimony on the fact that Sayles could not identify the exact basis for the citation Militano had issued. The latter ground is no basis for excluding the testimony as knowledge of the exact code section is irrelevant on the issue whether Militano lied about the incident. Sayles had knowledge of the substance of the section and the material issue at the trial on the citation and testified about them. Vehicle Code section 23117, subdivision (a), describes the violation of transporting an animal in the back of a vehicle in a space intended for the transportation of a load on a highway without properly enclosing or restraining the animal.[2] The

[2] Vehicle Code section 23117, entitled "Transporting Animal in Back of Vehicle," provides: "(a) No person driving a motor vehicle shall transport any animal in the back of the vehicle in a space intended for any load on the vehicle on a highway unless the space is enclosed or has side and tail racks to a height of at least 46 inches extending vertically from the floor, the vehicle has installed means of preventing the animal from being discharged, or the animal is cross tethered to the vehicle, or is protected by a (continued)

testimony of both parties was relevant on that point, and Sayles's defense that the animal was properly cross-tethered exactly addressed the issue. Sayles was a layperson who in his daily life did not deal with citations to statutes; to reject his testimony for such a de minimis lapse of memory was to exalt form over substance.

Nevertheless, the trial court did not abuse its discretion in excluding the testimony. The credibility of both Sayles and Militano was an issue in the hearing on the citation, and the conflict in testimony was determined adversely to Sayles. The evidence of the purported "lie"--that Militano wrote "untethered" on the citation but testified that the dog was improperly tethered at the hearing--is weak at best. Militano's paraphrase of the statute's name on the citation was not meant as a factual record of his observations but as notification to Sayles of the substance of the statute he was accused of violating. Sayles did not testify that at the hearing, Militano testified the dog was "untethered" but then changed his testimony to say the dog was tethered. Militano's testimony, as stated by Sayles, was that the dog was tethered with a 12-foot rope, that is, a rope long enough to allow the dog to fall, jump, or otherwise be ejected from the back of the truck.

The trial court was correct that to go into Sayles's heartfelt but unpersuasive complaint would cause an undue consumption of time in this trial in that the prosecution would likely present evidence to rebut Sayles's claim, and the parties would probably argue the issue exhaustively in closing.

Defendant was not denied the right to challenge Militano's credibility. He testified on numerous occasions that Militano was either incorrect or lying and at one point stated that Militano was "making up the majority of what he was saying." The jury heard the testimony of the other officers, who to some extent corroborated Militano's

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secured container or cage, in a manner which will prevent the animal from being thrown, falling, or jumping from the vehicle."

statements, and in some respects contradicted him. In addition, defendant had a full and fair opportunity to present his evidence.

In closing argument, trial counsel fully exploited the contradictions in the testimony. She questioned the probability that events happened the way the officers described, namely, the likelihood of defendant's running into a tree with his face and shoulder and not protecting himself with his hands if he was unhandcuffed as the officers claimed; the fact that defendant testified the marks of injuries on his back were from the asp while Militano testified striking defendant's back would have been an improper use of force so he confined his blows to defendant's legs; and the likelihood that defendant could have kicked Boone as Boone claimed if defendant was face down in the ivy with one hand pinned behind his back and the other hand underneath him at his waist. Counsel argued the probability that the bindle was either planted in the ivy by one of the officers or was fortuitously found by Boone and attributed to defendant. She pointed out inconsistencies in the officers' testimony, for example, Boone's recollection that he pointed out the bindle for Chong to pick up and Chong's recollection that Boone picked it up before Chong saw exactly where it was or could photograph it in situ; and Chong's testimony that he took photographs of defendant's injuries which were accurate depictions of defendant's condition at the time and then had to admit that another officer had taken the photographs and he had not seen defendant's injuries.

Defense counsel argued the credibility of the witnesses, for example, the genuineness of the officers' failure to recollect defendant's giving them the registration and insurance documents. She stated, "[t]hey didn't remember that. It's not that it didn't happen. They didn't remember. And there are an awful lot of, gee, I don't remember that. I don't remember that. . . . Because if it doesn't fit in with their version of the facts, then it's not helpful for them to remember that." Counsel argued that the officers' stories were "not entirely consistent because their stories are in part made up because their stories are to justify the fact that they beat the bejesus out of my client." Also, she

explained, "cops cover each others' backs" and "[o]fficers have an agenda" despite the public's wish to believe "that they are acting in the best interest of the public and that they would only make a mistake."

In light of this record, defendant was not denied the opportunity to demonstrate that Militano "lie[d] in the performance of his duties," and he was not denied his Sixth Amendment right to present a defense. The trial court did not abuse its discretion in excluding Sayles's testimony.

Defendant requests this court to independently examine the *Pitchess* material to determine whether additional records should have been produced. The People have no objection. A trial court's decision on the discoverability of material in police personnel files under *Pitchess* is reviewed for abuse of discretion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228.)

We examined the transcript of the in camera *Pitchess* hearing held on June 27, 2005, and we are satisfied that the trial court scrutinized the records and correctly determined there was no other discoverable material. The trial court did not withhold any pertinent evidence.

INEFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant contends that trial counsel was ineffective. "Although defense counsel properly obtained a ruling prior to trial that the prosecution could not impeach [defendant] with his prior convictions under Health and Safety Code section 11377 for possession of controlled substances, she played the dispatch tape for the jury without redacting it to exclude a reference to [defendant's] having a 'narco reg' [requirement]." Furthermore, during direct examination of defendant, defense counsel asked him about the statement he had denied making, namely, "I am not going back to the prison." She asked defendant if he had ever been to prison. The trial court sustained the prosecution's objection and then asked, "[d]oes he want to put his character at issue? [¶] [DEFENSE COUNSEL]: Your honor, . . . it's truth of the statement, and the truth of the statement is

he has not." The court then overruled the previously sustained objection. Defense counsel continued questioning in the same vein.[3] There was no ruling from the court that defense counsel had put defendant's character in issue.

What is more, "[d]efense counsel then made no objection when the prosecution called Officer Richard Patel to testify that 'narco reg' meant that [defendant] was a narcotic registrant who had to register within his city of residence because he had either been arrested for a drug-related offense, or was on parole for conviction of a drug-related offense," or has been "arrested in another state where in that state it was also a crime under the offenses listed in our Health and Safety Code section . . . [requiring] [t]hose persons . . . to register." No evidence of the reason for the registration requirement was placed in evidence. Finally, defense counsel made no objection when the prosecutor, in closing argument, stated: "they kept getting more information. They got the information about the XIV, which you know now is a gang tattoo, and they got some other bit of information, which I'm going to suggest to you was inadvertantly [*sic*] put in by the

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[3] Defense counsel continued: "Do you know the difference between prison and jail? [¶] A. Yes, I do. [¶] Q. Did you make the statement, 'I'm not going back to prison,' meaning you were not going back to jail?" [¶] A. No, I never [*sic*] been to prison. I wouldn't know what prison is like. [¶] Q. You were asked regarding whether you had any wants or warrants. Do you understand what that means? [¶] A. Yes, ma'am. [¶] Q. And what does that mean? [¶] A. That means that if you have either violated probation or if you're a parolee, basically violated, not reporting in, another case never went to court or such as that. [¶] Q. You are acquainted, then, with the criminal justice system? [¶] A. A little bit, yes, ma'am. [¶] Q. Okay. And you were asserting your rights not being a probationer or parolee when you said, 'Why are you hassling me?' Is that correct? [¶] A. That's correct."

On cross-examination, the prosecutor asked defendant what the difference was between jail and prison. Defendant stated, "[f]rom what I'm told, prison you got more leeway. Basically, you're allowed to--you do a lot more things. You don't have the same kind of food that you do here. It's a total different environment." Defendant confirmed he had been to jail "quite a bit," and agreed that he would not have been referring to jail time that he had done when he said he did not want to go back to prison. "I know the difference between jail and prison."

defense, which was that the defendant was a narcotics registrant. We know he's been in jail several times by his own admission. We know he was a narcotics registrant. So doesn't it make sense that he was the person in possession, that he did possess the methamphetamine in question in this case?" Defendant claims there is no sound tactical reason for counsel's failure to object to the improper "propensity" argument.

To prevail on a claim of ineffective assistance of counsel, a defendant must show not only (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, but also (2) that, as a result, the defendant was prejudiced, i.e., there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93.) "When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation." (*People v. Anderson* (2001) 25 Cal.4th 543, 569.)

The People argue that "a tactical reason may explain defense counsel's choice not to redact the portion of the dispatch tape which indicated that [defendant] was a narcotics registrant. Specifically, [defendant] testified in his own defense. During his testimony, it became clear that he had a criminal record. . . . Accordingly, defense counsel may have wanted to dispel any speculation by the jury that [defendant] had a violent criminal record. To do so, she may have intentionally introduced the evidence from the dispatch tape that [defendant] was a narcotics registrant. To this end, she may also have chosen not to object to testimony explaining what a narcotics registrant was. Defense counsel's decision not to object to the prosecution's closing argument may . . . have been . . . based on her desire either not to draw the jury's attention to the prosecution's comments or not to suggest to the jury that she believed the evidence undermined the defense or was otherwise troubled by it."

Defense counsel's trial tactics or strategic reasons for the complained-of actions do not appear in the record. However, a reviewing court may determine that the defendant has been denied the effective assistance of counsel if "there can be no satisfactory explanation" for counsel's action or inaction. (*People v. Coddington* (2000) 23 Cal.4th 529, 652.)

The People do not argue or suggest that the evidence and argument he complains of, that is, "narco reg," Officer Patel's testimony explaining the meaning of that term, and the prosecutor's closing argument inviting the jury to convict defendant of the possession charge because he was a narcotics registrant and was in jail before, was relevant or admissible. Thus the People implicitly concede that it was not. For one thing, the evidence was clearly more prejudicial than probative. (§ 352.) The statement "narco reg" in the dispatch tape was an objectionable hearsay statement (§ 1200), offered to prove defendant's propensity to commit narcotics offenses. (§ 1101, subds. (a), (b).) Officer Patel's testimony was equally prejudicial, and the prosecutor's final argument was an impermissible appeal to the jury to use evidence of defendant's character to prove his conduct on a specified occasion. (§ 1101, subd. (a).) The sole issue in regard to count 2, a violation of Health and Safety Code section 11377, was whether defendant possessed the bindle. The inadmissible character evidence plainly could have had a prejudicial effect on the jury's consideration.

There was no conceivable reason why defense counsel did not seek to redact (*People v. Guizar* (1986) 180 Cal.App.3d 487, 492) or object to the introduction of the "narco reg" reference of the dispatch tape. Once the evidence was in, counsel could have somewhat lessened the effect by objecting to Officer Patel's testimony and by seeking a ruling in advance or objecting during trial and by objecting to the prosecution's exploitation of the evidence in closing argument. Finally, counsel did not seek an instruction from the court admonishing the jury not to consider the evidence for any purpose.

It remains to ascertain whether the admission of the evidence could have altered the verdict and was thus prejudicial. Reversal is required only if the error resulted in a miscarriage of justice. (§ 353.) In this context, a miscarriage of justice occurs when this court is able to say that absent the erroneously admitted evidence, it is reasonably probable the jury would have reached a result more favorable to defendant. (*People v. Watson* (1956) 46 Cal.2d 818.)

The People claim the evidence, absent the improper testimony and argument, was overwhelming. Defendant was nervous and sweaty, disobeyed orders, and fled. Evidence of flight may support an inference of consciousness of guilt. (Pen. Code, § 1127c ; CALJIC No. 2.52.) The officers had to use reasonable force to subdue defendant. Two officers were present when the bindle was found. Defendant had extensive knowledge of the criminal justice system and stated he did not want to go back to prison and that possession of the bindle could not be pinned on him. The People ignore the conflicting statements about the finding of the bindle and the impeachment of the testimony of Boone and Militano that they did not know about defendant's tattoos from the dispatch tape and did not question him about them.

Defendant claims no one ever saw him in possession of a controlled substance. The officers' evidence regarding discovery of the contraband was conflicting, they were impeached by the dispatch tape about the tattoos so their credibility about other matters, for example, whether defendant made the statements about going back to prison and no one being able to "pin it" on him, was blemished. The officers did not testify that defendant was under the influence of a drug nor had "tracks" or other observable marks on his arms or neck showing that he used drugs. Furthermore, defendant had gainful employment and was competent at his job and was on a lunch break when the traffic stop occurred for a Vehicle Code violation of which the jury found him not guilty. Under these circumstances, it was reasonably likely that the outcome would have been more

favorable to defendant if the extremely prejudicial "narco reg" reference, the Officer Patel testimony, and the prosecutor's propensity argument had not been heard by the jury.

In light of our decision in this case, defendant's remaining contentions are moot.

DISPOSITION

The judgment is reversed. The petition for a writ of habeas corpus is dismissed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.

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